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In the Supreme Court of the United States

OCTOBER TERM, 1986

KELVIN W. DOUGLAS
SERGEANT, UNITED STATES ARMY,

PETITIONER

v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER the Due Process Clause is violated by the government's exclusive reliance upon an inference of knowledge in a prosecution for the wrongful use of a contraband drug, despite unrebutted evidence of unknowing use, thereby relieving the government of its burden to prove a *mens rea* element beyond reasonable doubt and placing a burden upon petitioner to persuade the fact finder of his innocence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner Kelvin W. Douglas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ___ M.J. ___ (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is reported at 22 M.J. 891 (ACMR 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987, affirming petitioner's conviction dated October 23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Uniform Code of Military Justice provides:

> Article 112a, 10 U.S.C. § 912a (Supp II 1984): "(a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
> (b) The substances referred to in subsection (a) are the following:
>
> > (1) . . . marijuana and any compound or derivative of any such substance.

The *Manual for Courts-Martial, United States, 1984,* provides:[1]

> Paragraph 37c(5): "To be punishable under Article 112a, . . . use . . . of a controlled substance must be wrongful. . . . [U]se . . . of a controlled substance is wrongful if it is without legal justification or authorization. . . . [U]se . . . is not wrongful if such act or acts are . . . (C) without knowledge of the contraband nature of the substance. . . . [U]se . . . of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial . . . shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use . . . was wrongful.

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[1] The provisions of the Manual for Courts-Martial have the force and effect of law to the extent they are consistent with the UCMJ. *United States v. Hawkins,* 2 M.J. 23 (CMA 1976); *United States v. Douglas,* 1 M.J. 354 (CMA 1976); *United States v. Ware,* 1 M.J. 282, 285 fn 10 (CMA 1976).

STATEMENT OF THE CASE

Petitioner was tried on September 15 and 16 and October, 21, 22, and 23, 1985, at Fort Lesley J. McNair, Washington, D.C., before a special court-martial composed of officer and enlisted members. The court-martial invoked jurisdiction pursuant to Article 2, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 802 (1982). Contrary to his plea, the petitioner was convicted of one specification alleging a wrongful use of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (Supp II 1984). The prosecution established that petitioner's urine had tested positive for the presence of THC[2] metabolites (Prosecution Exhibit 1). The prosecution also produced evidence tending to establish the chain of custody of the urine sample (Prosecution Exhibits 1, 2, and 3 introduced at R. 145-150, R. 159-161, and R. 164-168, respectively), and evidence tending to establish the scientific reliability of the urinalysis test itself (R. 174-189).

Petitioner presented evidence that he had unknowingly ingested marijuana contained in a chocolate cake shortly before the urinalysis test [(R. 242-246), (R. 252-257), (R. 267-273), (R. 289-293)]. This evidence included the in-court felony admission of the woman who baked the marijuana laced cake and delivered it for consumption at a party without informing anyone of its contraband contents (R. 242-246). Petitioner also presented expert testimony that oral ingestion of the type described in the defense testimony could result in a positive result in a urinalysis test at the level reported for petitioner (R. 306). Petitioner then presented extensive evidence concerning his good military character showing that wrongful use of marijuana was inconsistent with his character [(R. 320-324), (R. 327-331), (R. 332-335), (R. 336-338), and (R. 341-343)].

The government presented no evidence in rebuttal to the defense evidence concerning the circumstances of petitioner's ingestion of marijuana. Further, the government's expert witness was unable to affirmatively

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[2] THC is an abbreviation for tetrahydrocannabinol, the psychoactive ingredient in marijuana.

refute the testimony that a positive test result was possible under the facts as set out in the defense testimony (R. 366-375).

The court-martial entered findings of guilty to the charge of wrongful use of marijuana and sentenced petitioner to a bad conduct discharge, reduction to the lowest enlisted grade, and a fine of $400. On July 31, 1986, the Army Court of Military Review affirmed the findings and the sentence. *United States v. Douglas,* 22 M.J. 891 (ACMR 1986) (Appendix B).

The federal constitutional question involved has been substantially litigated at all stages of the appellate process. The issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE GOVERNMENT MAY EXCLUSIVELY RELY UPON AN INFERENCE OF KNOWLEDGE TO SATISFY ITS BURDEN OF PROOF ON THE ELEMENT OF WRONGFULNESS IN A PROSECUTION FOR WRONGFUL USE OF MARIJUANA WHERE THE ONLY GOVERNMENT EVIDENCE IS A POSITIVE RESULT OF A URINALYSIS TEST AND THE DEFENSE PRESENTS UNREBUTTED EVIDENCE OF INNOCENT USE.

On April 9, 1987, the Court of Military Appeals affirmed the decision of the Army Court of Military Review, relying upon its decisions in *United States v. Ford,* 23 M.J. 331 (CMA 1987) and *United States v. Murphy,* 23 M.J. 310 (CMA 1987). *United States v. Douglas,* ____ M.J. ____ (CMA 1987) (Appendix A).

REASONS FOR GRANTING REVIEW

I. THE COURTS BELOW HAVE, IN DRUG ABUSE CASES, IGNORED A FUNDAMENTAL PRINCIPAL OF DUE PROCESS BY RELIEVING THE GOVERNMENT OF ITS BURDEN TO PROVE EACH ELEMENT OF THE OFFENSE AND PLACING A BURDEN OF PERSUASION UPON THE ACCUSED.

The petitioner presents a substantial federal constitutional question dealing with the burden of proof in criminal trials. The question arises out of a disregard by the lower appellate tribunals of the decisions of this Court in *In re Winship,* 397 U.S. 358 (1970), *Mullaney v. Wilbur,* 421 U.S. 684 (1975), and *Patterson v. New York,* 432 U.S. 197 (1977), and a misunderstanding of this Court's decisions in *Francis v. Franklin,* 471 U.S. 307 (1985) and *County Court of Ulster County, New York v. Allen,* 442 U.S. 140 (1979).

Congress has made punishable by courts-martial the use of various contraband drugs, including marijuana, by members of the armed services. Article 112a, UCMJ. The offense consists of two elements. First, that the accused used a contraband drug and second, that the use was wrongful. *Manual for Courts-Martial, United States, 1984* [hereinafter *MCM, 1984*], Part IV, Paragraph 37b(2). Use of a contraband drug is wrongful if it is knowing and without justification or authorization. *MCM, 1984,* Part IV, Paragraph 37c(5). The element of wrongfulness is, in reality, a matter of *mens rea* and therefore requires that the use be knowing and intentional. *United States v. Thompson,* 21 C.M.A. 526, 45 C.M.R. 300 (1972); *United States v. West,* 15 C.M.A. 3, 34 C.M.R. 449 (1964).

The Manual for Courts-Martial establishes a permissive inference for the benefit of the government in its prosecution of drug offenses. If the government can establish use of marijuana, the trier of fact can infer that the use was wrongful in the absence of evidence to the contrary. *MCM, 1984,* Part IV, Paragraph 37c(5); *See also United States v. Harper,* 22 M.J. 157 (CMA 1986); *United States v. Fears,* 11 C.M.A. 584, 29 C.M.R. 400 (1960); *United States v. Crawford,* 6 C.M.A. 517, 20 C.M.R. 233 (1955). Therefore, in a prosecution for wrongful drug use based upon a urinalysis test, if the accused offers no explanation for the presence of the metabolite in his system, the court-martial may infer that the use was knowing and without justification or authorization.

This permissive inference places upon the accused a burden of going forward with evidence that the use was not wrongful. *MCM, 1984,* Part IV, Paragraph 37c(5); *Harper,* 22

M.J. at 162. However, once this burden of production is met, the burden of proof beyond reasonable doubt that the use was wrongful is upon the government.

> . . . [U]se of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with respect to any such exception [such as lack of knowledge] in any court-martial . . . shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented then the burden of proof is upon the United States to establish that the use . . . was wrongful.

MCM, 1984, Part IV, Paragraph 37c(5).

In the instant case, there was sufficient evidence presented for a court to find that use of marijuana had been proven beyond reasonable doubt. Had there been no further evidence, the government would have been allowed to exclusively rely upon the permissive inference to prove the element of wrongfulness.[3] The petitioner, however, presented substantial evidence that the use of marijuana had been unknowing. The military judge instructed the court-martial that the issue of innocent use had been raised by the defense evidence (R. 412). The government presented no direct evidence to rebut the evidence presented by the defense which tended to establish that petitioner's ingestion of marijuana had been innocent. The government relied, rather, upon an attack upon the credibility of the petitioner. *Douglas*, 22 M.J. at 894.

The Army Court of Military Review in affirming the petitioner's conviction, was unable to glean from the record any facts which tended to disprove petitioner's explanation of how the marijuana metabolites came to be in his urine. The

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[3] This assumes that the inference of wrongfulness set out in the Manual satisfies the requirements of *Ulster County*, 442 U.S. 140. This assumption may not be well grounded. A challenge to the inference of wrongfulness is being made before this Court in the case of *United States v. Tedder*, ____ M.J. ____ (CMA 1987), by means of a Petition for Writ of Certiorari. Should this Court conclude that the inference in the Manual does not satisfy the requirements of *Ulster County*, that decision would be controlling.

Court extracted only argumentative attacks upon credibility made by the prosecution during cross-examination of petitioner. *Id.* No admissions or retractions were made by any of the defense witnesses which tended to rebut the petitioner's explanation of innocent use. The Court of Review added that it was "persuaded that [petitioner's] introduction of unrebutted evidence opposed to the inference of wrongfulness should not in and of itself foreclose consideration of the inference by the factfinder." *Id.* The Court of Review then imparts a rule that the accused in such a case must persuade the finder of fact that the inference should not apply. *Id.* at 894-895.[4]

The Army Court of Military Review fails to reconcile its decision with the provisions of the Manual limiting the applicability of the inference of wrongfulness, and relies upon this Court's language in *Barnes v. United States,* 412 U.S. 837, 845 fn 9 (1973), that a jury is free to disbelieve the explantion of the accused. *Douglas,* 22 M.J. at 894, fn 4. The court fails, however, to see the distinction between the present case and *Barnes.* In the latter case the only evidence presented by the petitioner was his own testimony, while here the defense evidence included the in-court felony admission of the person who surreptitiously caused petitioner to ingest marijuana. Further, the Court of Military Review does not discuss the distinction that in the case *sub judice,* unlike *Barnes,* the inference is the product of the Manual provision which, by its own terms, limits its application only to those cases in which there is *no* evidence to the contrary.

The Court of Military Review placed its imprimatur upon the government substituting an attack upon the credibility of

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[4] Senior Judge Raby in his concurrence makes it clear that the court placed the burden of persuasion on the petitioner to establish that his use was not wrongful.

"We admonish all future offenders that a defense of innocent or unknowing use of marijuana will not overcome a permissible inference of wrongful use unless and until such defense is found sufficiently credible to be contrary to and to overcome such inference. Any other conclusion than that presented in the majority opinion would provide future offenders a windfall from the introduction of perjured or otherwise absurd testimony." Douglas, 22 M.J. at 895 (Raby, S.J., concurring).

defense witnesses, who testified that appellant's ingestion of marijuana had been innocent, in lieu of presenting evidence on the element of wrongfulness. This is impermissible. Disbelief of a particular witness does not permit the trier of fact to infer that the opposite of what the witness has testified is true. *Nishikawa v. Dulles*, 356 U.S. 129, 137 (1958); *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 576 (1951).

The Court of Military Appeals in its decision in *Ford*, 23 M.J. 331, first concludes that the Manual provisions dealing with the inference of wrongfulness do not preclude a conviction based upon a urinalysis result and the inference of wrongfulness in the face of evidence to the contrary. *Id.* at 333-335. The court then establishes a test whereby a conviction based upon the inference of wrongfulness may be affirmed "where the defense evidence contrary to the inference may be reasonably disbelieved by the factfinder." *Id.* at 334.

The Court of Military Appeals determined that the Manual provision dealing with the inference of wrongfulness does not mean what it says. The court noted that both paragraph 213a, *Manual for Courts-Martial, United States, 1951,* and the original version of paragraph 213b, *Manual for Courts-Martial, United States, 1969,* precursors to the current provision, created a presumption of wrongfulness that existed unless the contrary appeared. The court then noted that the inference or presumption under these provisions could still be drawn by the finder of fact if the contrary evidence could "reasonably be disbelieved".[5] The court then states it is unable to justify a change in this rule based upon the change in the language in the current Manual. *Ford*, 23 M.J. at 333-335. The Court of Military Appeals failed to recognize that the change in the language occurred after this Court's decisions in *Winship*, 397 U.S. 358 (1970), *Mullaney*, 421 U.S. 684 (1975), and *Patterson*, 432 U.S. 197 (1977), and doubtless was a recognition on the part of the drafters of the Manual that old military precedent was in conflict with this Court's notions of due process.

[5] The court in support of this proposition cites Paragraph 138a, MCM, 1951; Paragraph 138a, MCM, 1969; *United States v. West*, 15 C.M.A. at 7, 34 C.M.R. at 435 (1964); and *United States v. Biesak*, 3 C.M.A. 714, 722-724, 14 C.M.R. 132, 140-142 (1954).

The President, in Paragraph 37c(5), *MCM, 1984*, has created a procedure which comports with the Court's decisions concerning the use of inferences and due process. The Manual provision does nothing more than place upon the accused the burden of going forward with evidence that his case fits within one of the exceptions to the usual case where use of a contraband drug is wrongful. This burden of production is reasonable in that the government should not be required to disprove every conceivable exception to wrongfulness. The Manual provision, however, quite plainly states that wrongfulness may only be inferred in the absence of evidence to the contrary and that once an accused meets his burden of production, the burden of production and proof beyond a reasonable doubt on the element of wrongfulness rests with the government. The scheme set up by the President does not violate the principles of the Court set out in *Winship*, *Mullaney*, or *Patterson*.

The Army Court of Military Review and the Court of Military Appeals have, in the area of drug abuse, converted the traditional accusatorial system of justice into an inquisitorial system in which the accused must persuade the trier of fact of his innocence. By placing upon the accused a requirement to present an explanation of the presence of the drug in his system which "the trier of fact does not disbelieve", *Douglas*, 22 M.J. at 895, or could not "reasonably be disbelieved by the factfinder", *Ford*, 23 M.J. 334, the lower courts have placed upon the accused a burden of proving his innocence.[6]

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every [element] necessary to constitute the crime with which he is charged." *Winship*, 397 U.S. at 364. While the use of permissive inferences may pass constitutional muster in criminal trials, *Ulster County, Sandstrom v. Montana*, 442 U.S. 509 (1979), *Francis v. Franklin*, the use of these inferences cannot relieve the government of its burden to

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[6] Whether that burden of proof is beyond a reasonable doubt, by a preponderance, or some other standard is immaterial; under any standard it is a violation of the Due Process clause.

prove each element of the crime alleged beyond reasonable doubt. "*Mullaney* surely held that [the government] must prove every ingredient of an offense beyond reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *Patterson*, 432 U.S. at 215.

It is this requirement that the courts below have ignored. They have created a standard whereby the government is relieved of its burden to prove beyond reasonable doubt that the accused used contraband drugs knowingly and have substituted in the place of this requirement a burden upon the accused that he persuade the trier of fact that his use was unknowing. This requirement deprived petitioner of due process.

Since under the provisions of *MCM, 1984*, Paragraph 37c(5), the government cannot exclusively rely upon the inference of wrongfulness to satisfy its burden of proof on that element because petitioner presented substantial evidence to the contrary, there exists no evidence on the element of wrongfulness. The government failed in meeting its burden to prove wrongfulness beyond reasonable doubt.[7] The courts below erred by failing to put the government to this Due Process clause burden.

II. THE FUNDAMENTAL PRINCIPLE OF DUE PROCESS IGNORED BY THE COURTS BELOW IS THE ONLY SUBSTANTIAL PROTECTION SUSPECTED MILITARY DRUG OFFENDERS HAVE AGAINST WHAT WOULD OTHERWISE BE AN UNBRIDLED SYSTEM OF MILITARY DISCIPINE.

As the Court noted in *O'Callahan v. Parker*, 395 U.S. 258 (1969), trial by court-martial is very different than trial before a civilian court. A court-martial is not an independent instrument of justice. It is a specialized part of the military system of preserving discipline. *Id.* at 265. As noted by the Court, an accused in a court-martial is denied the benefit of

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[7] If the government is denied exclusive reliance upon an inference of wrongfulness, there was presented insufficient evidence for a reasonable finder of fact to be persuaded that the government proved that appellant knowingly used marijuana. Jackson v. Virginia, 443 U.S. 307 (1979).

indictment by grand jury, *id.* at 262, trial by jury,[8] *id.*, conviction only upon a unanimous verdict, *id.* at 263, and a trial presided over by a "judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition. . . ." *Id.* at 264. The Court also noted that courts-martial operate under the pervasive cloud of command control. *Id.* In addition to these concerns, persons tried by courts-martial are denied the full protection of the rights enjoyed by civilians to be secure against unreasonable searches and seizures[9] and the right to release from pretrial confinement on bail.[10]

All of these deprivations of rights guaranteed to citizens have been justified in courts-martial because of the unique

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[8] A military accused is also denied the right to a trial before a body consisting of a sufficient number of persons to insure accuracy. Unlike juries, courts-martial may convict persons of felony crimes upon the nonunanimous verdict of five persons in trials by general courts-martial and of three persons in trials by special courts-martial. Article 16, UCMJ. *Compare,* Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979).

The requirement of *Ballew* and *Burch* has been held not to apply to courts-martial. United States v. Guilford, 8 M.J. 598 (ACMR 1979) *pet. denied* 8 M.J. 242 (CMA 1980); United States v. Yoakum, 8 M.J. 763 (ACMR), *aff'd* 9 M.J. 417 (CMA 1980); Mendrano v. Smith, *797 F.2d 1538 (10th Cir. 1986).*

[9] *See e.g.,* United States v. Middleton, 10 M.J. 123 (CMA 1981); United States v. Hessler, 7 M.J. 9 (CMA 1979); United States v. Harris, 5 M.J. 44 (CMA 1978); United States v. Unrue, 22 C.M.A. 466, 47 C.M.R. 556 (1973); United States v. Poundstone, 22 C.M.A. 277, 46 C.M.R. 277 (1973).

The prosecution in the instant case arose out of an involuntary urinalysis test conducted pursuant to the government's authority under Military Rule of Evidence 313, MCM, 1984, to conduct "inspections" and thus gather evidence of crime without probable cause or authorization.

[10] RCM 305, MCM, 1984; *see* United States v. Gregory, 21 M.J. 952, 959 fn 3 (ACMR) *aff'd* 23 M.J. 246 (CMA 1986).

See also United States v. Cole, 24 M.J. 18, 27 (CMA 1987) (Everett, C.J., dissenting). Chief Judge Everett notes that an accused before a court-martial is provided less due process than a person tried before a civilian court. In particular the Chief Judge notes that accuseds before courts-martial are denied indictment by grand jury, *id.* at 28, the right to be released on bail, *id.* at 30, fn 6, and most significantly, the right to a trial by jury, *id.* at 30.

necessities of the military. *See O'Callahan*, 395 U.S. at 265; *Parker v. Levy*, 417 U.S. 733, 743 (1974); *Brown v. Glines*, 444 U.S. 348 (1980). There is, however, no military necessity which requires that a military accused, even a suspected drug user, be denied that fundamental due process protection of placing the burden of proof of guilt upon the government.[11] Not even the military's compelling need to eliminate drug users from the service justifies an erosion of due process in military criminal prosecutions for drug use.[12]

The ultimate protection of the individual service member when the full weight of the government is thrown into a prosecution by court-martial is the requirement that fundamental due process be satisfied. It is, in the final analysis, the presumption of innocence and the placing of the burden of proof upon the government that prevents courts-martial from dispensing drumhead justice. These concepts provide the last bulwark against the injustice which would result were the military system of discipline left unbridled.[13]

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[11] "When a party urges that a different rule obtains in the military than in the civilian sector, the burden is upon that party to show the need for such a variation." United States v. Ezell, 6 M.J. 307, 313 (CMA 1979) *citing* Courtney v. Williams, 1 M.J. 267 (CMA 1976).

[12] "[T]he constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." Burns v. Wilson, 346 U.S. 137, 142-143 (1953).

The Secretary of the Army and the other Service Secretaries have promulgated regulations which authorize the administrative discharge of drug users even in those cases where the government cannot prove the element of wrongfulness beyond a reasonable doubt. *E.g.* Army Regulation 635-200, Chapters 13 and 14 (5 July 1984) (Enlisted Ranks Personnel Update, 30 January 1987).

[13] The necessity of these protections become significantly more important when the recent expansion of court-martial jurisdiction is considered. Since this Court's decisions of *O'Callahan*, Relford v. Commandant, 401 U.S. 355 (1971), and Schlesinger v. Councilman, 420 U.S. 738 (1975), the bounds of court-martial jurisdiction have substantially grown. *See e.g.* United States v. Solorio, 21 M.J. 251 (CMA 1986), *cert. granted*, ___ U.S. ___, 106 S.Ct. 2914 (1986); United States v. Cole, 24 M.J. 18 (CMA 1987).

The Army Court of Military Review and the Court of Military Appeals have, in the area of prosecution for drug offenses, thrown down that last bulwark. The military appellate courts have now denied military members accused of drug offenses the most basic protection against the dangers of an unbridled system of discipline.[14] The traditional accusatorial system which American citizens enjoy is transformed in military prosecutions for drug offenses into an inquisitorial system in which the accused must persuade the court-martial of his innocence. In a prosecution for a drug offense in which conviction, possible confinement, and life long stigmatization by a punitive discharge is pursued without the protection of grand jury indictment, without trial by a jury of peers, without the benefits of trial before an objective and independent judge, lacking the full protection of the fourth amendment, and with the ever present specter of unlawful command control, the accused is now required to persuade the court-martial of his innocence. Such an affront to our established sense of fundamental fairness and due process should not be allowed to stand.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issues involved, the writ of certiorari should issue. The question presented is substantial and of great public significance.[15] It is timely in light of ever-increasing

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If, as *Solorio* suggests, court-martial jurisdiction is limited only by the imagination of prosecutors in describing a service connection, it is all the more essential that minimal due process requirements be guaranteed in all courts-martial.

[14] This is especially significant given the fact that court-martial jurisdiction over drug offenses is essentially all-encompassing. United States v. Trottier, 9 M.J. 337 (CMA 1980).

[15] While prosecution for drug offenses based upon urinalysis is currently a phenomenon limited to the military, the growing interest in urinalysis testing suggests that the civilian sector is fertile ground for the transplanting of this idea. *See* National Treasury Employees Union v. Von Raab, CA 5, No. 86-3833, 41 CrL 2097, April 22, 1987; Executive Order 12564 of September 15, 1986, "Drug-Free Federal Workplace", 51 FR 180, p. 32889;

public concern regarding drug use, the implementation of procedures to eliminate drug use, and the due process concerns such procedures have engendered. The Court of Military Appeals, in particular, has established a rule which deprives accused persons in a substantial portion of federal criminal jurisprudence of due process of law.

Respectfully submitted,

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Newsweek, September 22, 1986, "Getting Tough" (Urinalysis testing in schools); Time, September 15, "America's Crusade"; Newsweek, August 11, 1986, "Trying to Say 'No' " (Points to the military as precedent for urinalysis testing); Newsweek, May 5, 1986, "Can You Pass The Job Test?"; Time, March 17, 1986, "Battling the Enemy Within". For instance, nothing prevents a civilian private employer from providing to a prosecutor evidence of crime the employer obtained by testing his employee's urine.

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 55738/AR
SPCM 22028

UNITED STATES, APPELLEE

v.

KELVIN W. DOUGLAS, SERGEANT
U.S. ARMY, APPELLANT.

April 9, 1987

ORDER

On consideration of the granted issue (23 M.J. 399) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 9th day of April, 1987,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES ARMY
COURT OF MILITARY REVIEW

SPCM 22028

UNITED STATES, APPELLEE

v.

SERGEANT KELVIN W. DOUGLAS, SSN 263-45-6895,
UNITED STATES ARMY, APPELLANT.

JULY 31, 1986

Before RABY, CARMICHAEL, and ROBBLEE, Appellate Military Judges

For Appellant: Captain Floyd T. Curry (argued); Lieutenant Colonel Paul J. Luedtke, Major Dale K. Marvin (on brief).

For Appellee: Captain Susan E. Fine (argued); Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Byron J. Braun (on brief).

OPINION OF THE COURT

ROBBLEE, Judge:

Appellant was tried by a special court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (1982 and Supp. II 1984). Appellant was sentenced to a bad conduct discharge, a fine of $400.00, and reduction to the grade of Private E-1. The convening authority approved the sentence as adjudged.

Appellant contends, *inter alia*,[1] that the evidence is insufficient as a matter of law on the grounds that (a) the permissive inference of wrongfulness[2] is limited to circumstances where evidence of lawful use has not been introduced and (b) the government failed to disprove the special defense of ignorance or mistake of fact raised at trial incident to appellant's claim of innocent use. Additionally, in oral argument before this court, appellant urges that he was deprived of the presumption of innocence because, at trial, he was required to go forward with evidence establishing that his use of marijuana was lawful in order to rebut the permissive inference of wrongful use. Only appellant's assertions regarding sufficiency of the evidence merit discussion.

To prove its case on the charge, the government introduced duly authenticated records indicating that appellant had tested positive for the presence of tetrahydrocannabinol (THC), a marijuana metabolite. The chain of custody regarding the urine sample and the scientific reliability of the urinalysis test performed were established. Further, the expert witness for the government offered the opinion that the metabolite level in the sample was caused by other than passive inhalation.

The defense challenged the reliability of the test results, asserted that appellant had unknowingly ingested marijuana by eating several pieces of cake into which marijuana had been baked, and offered evidence of appellant's good character. The defense expert opined that orally ingested marijuana could result in a positive urinalysis result at the level reported in appellant's case.

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[1] Appellant, through counsel, asserts that the convening authority erred by approving a sentence including a bad conduct discharge where the record was nonverbatim and that his sentence, insofar as it included a fine, was inappropriate. Appellant also personally asserts error in the nature of prosecutorial misconduct, unlawful command influence, and inappropriately severe sentencing.

[2] Manual for Courts-Martial, United States, 1984, part IV para. 37c(5); United States v. Harper, 22 M.J. 157, 162 (CMA 1986) ("The inference of wrongfulness is a permissive inference or presumption, not a mandatory inference or presumption.")

The government presented no direct evidence to disprove appellant's claim of innocent use. Government cross-examination did, however, vigorously attack the credibility of the defense witnesses, including that of appellant. Cross-examination of appellant revealed, for example, that appellant had not considered his positive urinalysis as being incident to the ingestion of marijuana-laced cake until his defense counsel told him that mere passive inhalation could not adequately explain it; that at the party at which appellant had eaten such cake, a party attended by 35-40 people, many of whom were smoking marijuana, appellant, although testifying that he did not use marijuana but at the time believed that passive inhalation could result in a positive urinalysis, nonetheless stated that he was "unconcerned" about being present where marijuana was being used; and that while the alcohol which appellant drank the night of the party and on the day after the party dimmed his recollection of how much he drank on those two days, it did not obscure his ability to recall the characteristics of the cake in detail, the specific number of pieces of the cake which he had eaten on both days, and that the cake did not appear to contain any substance out of the ordinary.

The military judge instructed the members of the court that they could infer that appellant's use of marijuana was wrongful absent evidence ~~to the~~ contrary; that the inference was permissive, specifically, that "[t]he drawing of this inference [was] not required"; that the use of marijuana must be knowing; that the defense of innocent use and, by analogy, the defense of ignorance or mistake of fact had raised by appellant's claim that he had eaten portions of a cake laced with mariujana; that the court could not find appellant guilty if it had reasonable doubt that appellant knew of the presence of marijuana in the cake "no matter how unreasonable his lack of knowledge [might] have been"; that evidence of appellant's good military character might raise a reasonable doubt regarding his guilt; that the burden of proof to establish the guilt of the accused beyond a reasonable doubt was on the government; and that "[t]he burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the defense."

In our view, the question of whether the use of an illegal drug was wrongful is, in the last analysis, a question of fact. Inferences are evidentary devices fundamental to factfinding, *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979) and not violative of due process if there is a rational connection between the evidentiary and ultimate facts found.[3] *Id.* Such a connection exists if the ultimate fact of wrongfulness is more likely than not to be true once the fact of use has been proven. *See Ulster County Court v. Allen*, 442 U.S. at 165. We are persuaded that appellant's introduction of unrebutted evidence opposed to the inference of wrongfulness should not in and of itself foreclose consideration of the inference by the factfinder.[4] To do so would impermissibly frustrate the capacity of courts-martial to find ultimate facts and would disregard military precedent indicating that a properly raised inference or presumption should survive until the factfinder extinguishes it for lack of credibility. *See United States v. West*, 34 CMR 449, 453 (CMA 1964) ("Possession is, of course, presemed to be unlawful in the absence of an explanation thereof satisfactory to the court members"); *United States v. Biesak*, 14 CMR 132, 142 (CMA 1954) ("[A] presumption disappears only upon the presentation of evidence that the trier of fact does not disbelieve."). Accordingly, based on the circumstances of this case, we find that the military judge properly instructed the court members that they could infer wrongful use absent evidence to the contrary.

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[3] Constitutional validity under the Due Process Clause depends "on the strength of connection between the [evidentiary facts] and [the ultimate] facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently." *Ulster County Court*, 442 U.S. at 156.

[4] "Of course, the mere fact that there is some evidence tending to explain a defendant's [use of marijuana] consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.' (citation omitted). The jury is not bound to accept the correctness of the inference." Barnes v. United States, 412 U.S. 843, 845 n.9 (1972).

We also reject appellant's assignment of error based on ignorance or mistake of fact and that urged upon us in oral argument with respect to the burden of proof having been shifted. In this regard, the Supreme Court had indicated that

> [b]ecause [a] permissive [inference] leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

Ulster County Court v. Allen, 442 U.S. at 157. *Accord, United States v. Harper,* 22 M.J. 157, 162 (CMA 1986). Inasmuch as there is a recognized rational connection between the use of illegal drugs and wrongfulness in the military, *United States v. Harper,* 22 M.J. at 162 and cases cited therein, it was not impermissible for the govenment, in the instant circumstances, to rely on the permissive inference of wrongful use, in addition to the related evidence on which it was based, to disprove the defense of ignorance or mistake of fact. Moreover, since the Supreme Court has approved the practice of requiring an accused to show why a permissive inference should not be applied against him as above, *Ulster County Court v. Allen,* 442 U.S. at 157; *United States v. Harper,* 22 M.J. at 162, we find no impropriety in requiring appellant to do so where, as here, the court was properly instructed on both the inference and the burden of proof. Consequently, we further find no infringement upon the presumption of innocence to which appellant was entitled. Thus, we conclude that the permissive inference of wrongfulness was properly before the court and the evidence of record, to include the inference of wrongfulness, was sufficient to support a finding of wrongful use beyond a reasonable doubt.

We have considered the issues personally raised by the appellant and find them to be without merit.

The findings of guilty and the sentences are affirmed.

Judge CARMICHAEL concurs.

RABY, Senior Judge, concurring:

I concur with my brother judge's opinion.

We admonish all future offenders that a defense of innocent or unknowing use of marijuana will not overcome a permissible inference of wrongful use unless and until such defense is found sufficiently credible to be contrary to and to overcome such inference. Any other conclusion than that presented in the majority opinion would provide future offenders a windfall from the introduction of perjured or otherwise absurd testimony.

FOR THE COURT,

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

U.S. GOVERNMENT PRINTING OFFICE: 1987—179-740/42012

(2)

Supreme Court, U.S.
FILED
JUL 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1893

In the Supreme Court of the United States

OCTOBER TERM, 1987

KELVIN W. DOUGLAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an instruction permitting the court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense to petitioner.

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BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1893

KELVIN W. DOUGLAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 2a-7a) is reported at 22 M.J. 891.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987. The petition for a writ of certiorari was filed on May 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort McNair in Washington, D.C. Petitioner was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to a $400 fine, a reduction in rank, and a bad conduct discharge. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (& Supp. III) 860, and approved the sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-7a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. The charge against petitioner was the result of a urinalysis test conducted on April 30, 1985 (Tr. 145-150). Petitioner tested positive for tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana (GX 4). The test result, evidence regarding the chain of custody of all the urine samples, and expert testimony supporting the scientific reliability of the urinalysis test, were presented at trial (GXs 1-4; Tr. 145-150, 159-161, 164-168, 177-189). Petitioner's defense consisted of a claim that he had innocently ingested marijuana prior to the urinalysis test. He asserted that he had unknowingly ingested marijuana that had been baked into a chocolate cake which he consumed at a party several days before the urinalysis test (Tr. 289-305).[1]

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[1] Petitioner's defense was supported by testimony from the woman who allegedly baked the cake and from the woman who gave the party (Tr. 242-267). Petitioner also produced an expert to establish that ingesting marijuana in this manner could have caused a positive test result (Tr. 306). The court

2. At the close of the evidence, the trial judge advised the court-martial panel that in order to convict, the panel had to find that petitioner's use of the marijuana was wrongful. The judge then instructed the panel, without objection from petitioner, that the use of marijuana "may be inferred to be wrongful in absence of evidence to the contrary" but that the "drawing of this inference is not required" (Tr. 412). The court then continued as follows, discussing petitioner's defense of innocent use (Tr. 412-413):

> Now, there has been evidence introduced raising an issue whether the accused's use of marijuana was wrongful in light of the fact that he may have eaten a cake with marijuana in it without knowledge that there was marijuana in his cake. This raises the issue of innocent use. In determining this you must consider all relevant facts and circumstances including, but not limited to, the testimony of the witnesses concerning the baking of the cake, and the party, the opinion of Doctor Manders that the eating—eating marijuana in a cake could possibly result in a positive finding, the circumstances surrounding this eating, and it is certainly appropriate that you consider the lack of any specific government evidence regarding the circumstances of the use. Since their evidence in this case is solely on the use of urinalysis, you may find the accused guilty only if you are satisfied beyond a reasonable doubt that the accused's use of marijuana was not the result of the eating of the cake that

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of military review noted that in response to this evidence the prosecution "vigorously attack[ed] the credibility of the defense witnesses" through cross-examination (Pet. App. 4a). The court went on to highlight several inconsistencies in the defense witnesses' testimony that had been brought out during cross-examination (*ibid.*).

> contained marijuana without knowing of its content. Put another way, to be illegal and unlawful under Article 112a, the use of marijuana must be knowing and conscious[.] If the accused was, in fact, ignorant of the presence of marijuana in the cake that he ate then he cannot be found guilty. The accused's actual unawareness of the marijuana is a defense no matter how unreasonable his lack of knowledge may have been.

Thereafter, the trial judge repeatedly instructed the panel that the burden of proof regarding wrongfulness was on the prosecution (Tr. 413, 416):

> The burden is on the prosecution to establish the guilt of the accused. If you are satisfied beyond a reasonable doubt—well, in order to find the accused guilty you must be satisfied beyond a reasonable doubt that the accused did not unknowingly eat marijuana in the cake. Now, put another way, if the evidence that he did eat marijuana without knowing what it was, if that raises a reasonable doubt then you must acquit the accused. * * *
>
> * * * * *
>
> I'll mention again, in order to find the accused guilty you must find that he ingested marijuana, that he knew it was marijuana, that he knew it was marijuana if, in fact, he ever did ingest marijuana. This knowledge, like any other, may be proved by circumstantial evidence.

The only presumption the trial judge mentioned in the course of the instructions was that "the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt" (Tr. 418).

3. The Army Court of Military Review affirmed petitioner's conviction (Pet. App. 2a-7a). Petitioner challenged the constitutionality of the permissive inference of wrongful consumption that permits a court-martial panel to infer that the use of marijuana is wrongful in the absence of evidence to the contrary. The court of military review, however, found the inference to be constitutional, because the inference was a rational one and because it did not compel the finder to fact to find against petitioner or in any way shift the burden of proof to petitioner (Pet. App. 5a-6a).[2] The Court of Military Appeals summarily affirmed petitioner's conviction (*id.* at 1a).

ARGUMENT

Article 112a of the UCMJ, 10 U.S.C. (Supp. III) 912a, makes it a crime for a servicemember wrongfully to use marijuana. To establish a servicemember's guilt, the government must prove that a servicemember knowingly used marijuana without justification or authorization. *E.g.*, *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37b(2); *United States* v. *Ford*, 23 M.J. 331, 332-333 (C.M.A. 1987); *United States* v. *Harper*, 22 M.J. 157, 161-162 (C.M.A. 1986); *United States* v. *Grier*, 6 C.M.A. 218, 19 C.M.R. 344 (1955); *United States* v. *Greenwood*, 6 C.M.A. 209, 19 C.M.R. 335 (1955). The government may prove that a serviceman wrongfully

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[2] Article 66(c), UCMJ, 10 U.S.C. 866(c), authorizes courts of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." The Army Court of Military Review independently reviewed the sufficiency of the evidence against petitioner and concluded that he was guilty.

used marijuana by relying on the presence of the constituent elements of marijuana in a servicemember's blood or urine and expert testimony explaining any scientific evidence that is introduced at trial. *United States* v. *Ford*, 23 M.J. at 332-335; *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987). Once it establishes that the servicemember used marijuana, the government can carry its burden of showing wrongful use by relying on a permissive inference that a serviceman's use of contraband is wrongful. *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37c(5); *United States* v. *Ford*, 23 M.J. at 332-335; *United States* v. *Murphy*, 23 M.J. at 312; *United States* v. *Harper*, 22 M.J. at 162.[3]

The instructions given to petitioner's court-martial panel permitted the panel to infer that petitioner's use of marijuana was unlawful. Petitioner contends that the permissive inference violates the Due Process Clause, for several related reasons.[4] None of petitioner's claims has merit.

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[3] The *Manual* provides as follows, in pertinent part (Pt. IV, para. 37c(5)):

> Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be on the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

[4] Petitioner does not claim that the *Manual* provision is invalid on the ground that it requires the defendant to bear the burden of production on an element of the offense. Such a claim would lack merit in any event. As the Court of Military

1. Petitioner contends (Pet. 6-10) that the instructions shifted the burden of proof on wrongfulness from the government to him. Petitioner, however, did not object to the instructions. Accordingly, he can prevail on his claim only if he can establish that the instructions constituted plain error that produced a miscarriage of justice. See Rule for Courts-Martial 920(f), *Manual for Courts-Martial, United States, 1984*; *United States* v. *Fisher*, 21 M.J. 327 (C.M.A. 1986) (the standard of review for an instructional error raised for the first time on appeal is plain error). The instruction in this case did not constitute plain error; indeed, it was not erroneous at all.

The trial judge's instruction referred to a permissive inference, not to a mandatory presumption. The instruction was therefore materially different from the instruction given in *Francis* v. *Franklin*, 471 U.S. 307 (1985), on which petitioner relies. The instruction in *Francis* stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Id.* at 311. Those instructions

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Appeals explained in *United States* v. *Harper*, 22 M.J. at 162, the permissive inference authorized by the *Manual* only requires a defendant to come forward with some evidence that his use of marijuana was innocent. Shifting the burden of going forward to the defendant is not unconstitutional. *E.g.*, *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *Engle v. Isaac*, 456 U.S. 107, 120-121 & n.20 (1982); *Mullaney* v. *Wilbur*, 421 U.S. 684, 701-703 nn. 28, 30-31 (1975); *Barnes* v. *United States*, 412 U.S. 837, 846 n.11 (1973); *United States* v. *Harper*, 22 M.J. at 162.

created the risk that they could have been understood by the jury as a direction to presume an essential element of the charged offense. By contrast, the instruction given here told the court-martial panel only that it could infer that petitioner's use of marijuana was wrongful. An instruction permitting the trier of fact to infer an ultimate fact (such as wrongfulness) from a basic fact (such as use of marijuana) is ordinarily unobjectionable, since a permissive inference leaves the fact-finder free to credit or reject the suggested conclusion based on the evidence at trial. *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 10; *Francis* v. *Franklin*, 471 U.S. at 314-315; *Ulster County Court* v. *Allen*, 442 U.S. 140, 157-163 (1979). Because the trial judge in this case made it clear that the court-martial panel was not required to draw the inference,[5] the instruction created only a permissive inference and did not shift the burden of proof to petitioner. See *Ulster County Court*, 442 U.S. at 157; *United States* v. *Kimmel*, 777 F.2d 290 (5th Cir. 1985), cert. denied, 476 U.S. 1104 (1986); *United States* v. *Love*, 767 F.2d 1052, 1059-1060 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); *United States* v. *Johnson*, 756 F.2d 453, 454-455 (6th Cir. 1985).

The instruction was also not invalid on the ground that it encouraged the court-martial panel to draw an irrational connection between the use of marijuana and the wrongfulness of that use. A permissive inference can be challenged only if the inference is unjustified when the evidence is viewed in

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[5] The panel was repeatedly told that it must return a not guilty verdict if it believed that petitioner had innocently ingested marijuana (Tr. 411, 412, 413, 416).

light of reason and common sense. *Francis* v. *Franklin*, 471 U.S. at 314-315; *Ulster County Court*, 442 U.S. at 157-165. That is not the case here. As the Court of Military Appeals explained in *United States* v. *Ford*, 23 M.J. at 337, the inference is a rational one in the military setting, for several reasons. First, the possession or use of marijuana is a crime in the military community, and, unlike some jurisdictions in the civilian community, the military has not decriminalized the possession or use of marijuana in small amounts by servicemembers. Thus, to a serviceman marijuana is contraband, which reduces the likelihood that any particular use of marijuana will be innocent. Moreover, in recent years the military has greatly intensified and publicized its efforts to eliminate drug abuse by servicemen. That effort has given servicemembers notice to avoid any and all use of controlled substances, which further reduces the likelihood of an innocent use. In addition, the physiological effects of the use of marijuana alert a person to the presence of marijuana in his system and make it unlikely that he will be unable to account for its presence. Finally, "human experience in terms of self-preservation generally dictates that a person, whether a servicemember or not, generally knows what he consumes." *Ibid.* Taken together, these factors establish a logical connection between the predicate fact that a servicemember used marijuana and the ultimate fact that the use was wrongful. Since this conclusion is one that reason and common sense justify in the factual setting of this case, the instruction did not violate the Due Process Clause. See *Barnes* v. *United States*, 412 U.S. 837 (1973) (instruction that the jury can infer the defendant's

guilt from the unexplained possession of recently stolen property comports with due process).

2. Petitioner also contends (Pet. 8-9) that the military courts have misinterpreted the *Manual for Courts-Martial* by ruling that the trier of fact may infer that a serviceman's use of marijuana is wrongful even where a defendant has presented evidence to the contrary. Petitioner claims that the *Manual* does not allow this inference to be drawn when the defense has presented contrary evidence and that, in those cases, the *Manual* requires the government to offer direct proof that the defendant has wrongfully used marijuana.[6] That contention does not merit further review, for several reasons.

Petitioner's contention involves a narrow question of the proper construction of the *Manual for Courts-Martial* that has no application beyond the military justice system and that presents no conflict among the circuits. Moreover, the permissive inference about which petitioner complains has existed in military law for more than 35 years.[7] During that time, the Court of Military Appeals has interpreted the *Manual* to permit a court-martial panel to draw an inference of wrongful use in situations where a defendant offers some evidence that the use of contra-

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[6] Petitioner relies on that portion of the *Manual* (Pt. IV, para. 37c(5)), stating that "[p]ossession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary."

[7] See *Manual for Courts-Martial, United States—1951*, para. 138; *Manual for Courts-Martial, United States—1969 (rev. ed.)* para. 138a(2); *Manual for Courts-Martial, United States —1984* Pt. IV, para. 37c(5); *United States* v. *Ford*, 23 M.J. at 337.

band was innocent. *E.g.*, *United States* v. *Ford*, 23 M.J. at 334-337; see *United States* v. *West*, 15 C.M.A. 3, 34 C.M.R. 449 (1964). The interpretation of the *Manual for Courts-Martial* adopted by the military courts is entitled to considerable deference. *E.g.*, *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Hiatt* v. *Brown*, 339 U.S. 103, 109 (1950). The Court of Military Appeals' construction of the *Manual* is also entirely consistent with this Court's decision in *Barnes* v. *United States*, 412 U.S. at 845 n.9, which recognized that a similar inference may be drawn even when the defendant presents contrary evidence.[8]

Finally, the Court of Military Appeals' interpretation of the *Manual* is correct. The background to and development of the current version of the *Manual* shows that the provision on which petitioner relies

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[8] As this Court explained in *Barnes* v. *United States*, 412 U.S. at 845 n.9: "Of course, the mere fact that there is some evidence tending to explain a defendant's possession [of stolen goods] consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.' * * * The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference."

Petitioner maintains (Pet. 7) that *Barnes* v. *United States* is inapposite for two reasons, but neither purported distinction has merit. Petitioner claims that this case is different because the contrary evidence consisted of incriminating testimony from a third party, rather than exculpatory testimony from the defendant. That distinction is immaterial, since the jury is entitled to disbelieve defense witnesses no less than the defendant himself. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966). Petitioner's other proposed distinction —that the inference authorized by the *Manual* is limited to cases in which no contrary evidence appears—is wrong for the reasons given in the text below.

was designed to allow the government to rely on the inference unless the contrary evidence created a reasonable doubt as to guilt. *United States* v. *Ford*, 23 M.J. at 334. Read as a whole, the *Manual* allows the fact-finder to assess the relative merits of the evidence presented and independently to decide whether to draw the inference. *Id.* at 335. Petitioner's interpretation of the *Manual*, by contrast, would deprive the government of a reasonable inference whenever a defendant uttered a bare denial of wrongdoing; that result would greatly impair the government's ability to prosecute the use of contraband, which is often performed in secret. The military courts therefore properly rejected petitioner's theory.

3. Finally, petitioner contends (Pet. 10-13) that the inference of wrongfulness is fundamentally unfair and violates principles of due process for that reason. Petitioner's argument on that point reduces to the following proposition: The government's evidence was sufficient to establish that petitioner's use of marijuana was wrongful until petitioner introduced some contrary evidence that his use was innocent; at that point, the Due Process Clause required the government to introduce direct proof that petitioner's use was wrongful, and it prohibited the court-martial panel from relying on a belief that petitioner's witnesses lied as the basis for finding him guilty.

That proposition is fundamentally flawed. There is no rule of law that requires the government to offer independent evidence of wrongfulness after it has offered evidence that the defendant has used a controlled substance. That is, there is no constitutional principle that requires that a defendant be granted a directed verdict of acquittal if the government fails to offer independent evidence that the use of the con-

trolled substance is wrongful, once the government has established that the defendant used the substance. Nor is there any principle of fairness that requires the government to offer such independent evidence after the defendant has offered evidence that his use was not wrongful. Indeed, it has long been accepted that a finder of fact, in considering testimony offered for a particular purpose, can conclude that that testimony not only does not support the proposition for which it was offered, but in fact supports the opposite proposition.[9]

The instruction regarding the permissive inference of wrongfulness did no more than advise the court-martial panel that it was not required to credit petitioner's witnesses, and that it could find petitioner guilty if it was satisfied from all the evidence that the government had proved wrongful use of marijuana beyond a reasonable doubt. The trial judge made it clear that the burden remained on the prosecution to satisfy the court-martial panel that the defendant's use of marijuana was wrongful; the permissive inference instruction simply advised the panel that it could reach that conclusion without the

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[9] As Judge Learned Hand colorfully put it: "It is true that carriage, behavior, bearing, manner and appearance of a witness—in short, his 'demeanor'—is a part of the evidence. * * * This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale. Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer* v. *McDougall*, 201 F.2d 265, 268-269 (2d Cir. 1952) (footnote omitted).

need for evidence specifically directed to the issue of wrongfulness, and even in the face of defense evidence seeking to rebut the claim of wrongfulness.

Instructing the panel in that fashion is not unfair. It exposes a defendant to conviction for wrongful use of a controlled substance only if the court-martial panel is convinced, after considering all the evidence, that the use was in fact wrongful; thus, in cases such as this one, where the defendant puts on a defense of innocent use, the defendant can be convicted only if the court-martial panel finds beyond a reasonable doubt that that defense is false. Far from altering the burden of proof, the instruction given in this case simply reminded the court-martial panel that in reaching its verdict it was free to consider all the evidence and was not bound to accept any of it, even if particular evidence was not specifically rebutted by the opposing party.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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